

John Tidcombe, Esq;
Appellant.

James Boddington and John
Cholmley, Merchants, } Respondents.

The Respondents C A S E.

Feb. 1695.

MR. James Moyer being Agent to several Regiments, applyed to the Respondent Boddington, and Mr. Tracy Pauncefort, to Cloath the four Regiments of the Appellant Sir David Collyer, Colonel Lawder, and Colonel Brewer, for the Year 1696, and desired they would advance the Money, and admit him to be concerned with them in such Cloathing.

The Prizes and Particulars being agreed on, Moyer brings a Contract for the Goods for the Appellant's Regiment, with, and in the Name of the Respondent Cholmley, under the Appellant's Hand and Seal, and at the same time an Assignment from the Appellant of the Off-reckonings of his Regiment, both Dated 10th of February, 1695; the Words of the Appellant's Contract, written under the particular of the Goods, are these, *The above Quantities of Cloaths and Accoutrements, amounting to the Sum of 2331 l. 12 s. 6 d. I do approve of to be provided, and do hereby Contract and Agree for the same with John Cholmley, of London, Merchant, which are to be delivered to me, or my Order, in London the 20th of March next.* In Witness whereof I have hereunto set my Hand and Seal this 10th Day of February, 1695.

Upon Credit of this Contract, the Goods were accordingly delivered, most of them bought and provided with the Respondent Boddington's Money, and therefore all the Contracts were left with him.

Some time after, the Respondent Boddington went to the Pay-master's Office to receive the Benefit of the Assignment, and then found the Appellant had before that time assigned all the Off-reckonings for 1696, to one Glover, who received them accordingly.

The Appellant's Regiment for the Year 1697, was Cloathed by Pauncefort and Moyer, and they had all that Year's Off-reckonings paid them, except the Sum of 430 l. 7 s. 4 d. which has been lately paid to the Respondent Boddington, in part of the said Contract.

April 1698.

The Appellant's Regiment went over into Ireland, and is there still, so that the Assignment, made as aforesaid, to the Respondent, became of no Benefit to him from that time: But the Appellant has the same Power of his Off-reckonings there, as he had in England, and it is his Duty, as a Colonel, to apply them to the Cloathing in Arrear, so that the Off-reckonings of one Year with another, may Discharge the whole Debt for Cloathing, which is not in the Power of the Respondent, or any other, but the Colonel to effect.

Pauncefort, Moyer, and Respondent Boddington have by Articles since divided their Interest in the Cloathing the four Regiments, and the Appellant's and Colonel Brewer's Regiments have fallen to Respondent Boddington's Share, and thereby the Respondent Cholmley's Name is now used in Trust for him only.

The Appellant taking no care to pay according to the Contract, and the Respondent having no possible Method to recover the Money but against the Appellant, in Michaelmas-Term, 1699, the Appellant was Arrested in an Action of Debt upon the Contract in Cholmley's Name; and in that Vacation he brought a Bill in Chancery, which the Respondents Answered.

Hill-term, 99.

The Appellant pleaded a Special Plea (which might have caught the Respondent Boddington, but did not go to the Justice of the Cause) that the Goods in the Contract were not delivered to the Appellant, or Order, in London by the 20th of March, (which was the time limited in the Contract) and on the 7th of March 1699, Appellant moved, and dismissed his Bill in Chancery, and paid Costs.

Easter-term, 1700.

Issue was joyned at Law upon the Appellant's Plea, and the Cause was tryed in Trinity-term by a special Jury of Gentlemen, and upon a long Defence and full Evidence, a Verdict was found agreeable to the Opinion of the Court, for the Respondent Cholmley, for the Debt being 2331 l. 12 s. 6 d.

Cause Heard Feb. 1700.

The Appellant brought another Bill, and the Respondents put in the same Answers as they did to the former, and Witnesses being examined on both sides, the Cause was heard on the 11th and 20th of February last, before the Right Honourable the Lord-Keeper, who was pleased to declare, That the Debt demanded by the Respondent, was a just and honest Debt, and that he saw no Cause in Equity to relieve the Appellant, further then that the Respondents should Levy no more than the principal Sum and Costs at Law, deducting the 430 l. 4 s. 4 d. acknowledged to be received. But gave the Respondents no Costs in Equity.

Obj.

The Appellant by his Bill and Appeal makes his Case to be, That he being a Colonel of a Regiment, it is his Duty to Contract for the Cloathing, but that he is not lyable in his own Person, but that the Clothier is to take the Off-reckonings for his Payment; and this he saith was the Conditions of the Agreement for the Cloathing in Question.

Answer.

The Respondents do not deny but that they were to take the Off-reckonings in Payment as far as they would extend, but the Appellant had Pre-assigned every Farthing of the Year 1696, to other Persons. And by the Usage of the Army, two Pence per Diem (which is called Off-reckonings) is always deducted out of the Soldiers Pay, as sufficient for the Cloathing, and is so: And if the Colonel exceeds that in his Cloathing, he must take Care to save it up another Year, or is liable in his own Person to the Clothier, and the Government is not concerned to make good such Over-cloathing, nor is it fit the Clothier should lose it; and if it was otherwise, the Charge of every Regiment would be wholly uncertain; it would Overthrow all Method in Regulating the Pay of the Army, and destroy all Credit for Cloathing. And it is not reasonable the Clothier should lose his Due, either by the Over-cloathing or Transferring the Regiment to other Establishments, when he could neither prevent the one, nor Reimburse himself out of the other, as the Colonel may.

And as to the pretended Evidence of a Verbal Agreement, qualifying the express and absolute Contract in Writing, as aforesaid, 'tis of most dangerous Consequence to admit of any such Verbal Evidence against a Contract reduced into Writing under Hand and Seal, which is meant to supersede all Discourse, and to prevent the Perjury usual when such Unwritten Agreements are to be proved; and the rather in this Case, because Moyer was the Appellant's Agent, when he made the Contract, and brought it ready Sealed to the Respondent. And now having provided for his own Money, and become unconcerned in the Cloathing in Question, swears, That notwithstanding the Writing, he agreed with the Appellant, his Colonel, that he should not be liable in his own Person; wherein he ought not to be credited, and if he did so, the bringing a positive Contract to the Respondent, (which was wholly unnecessary, if the Agreement was, as he swears,) was a Fraud imposed on the Respondent, as he humbly conceives.

And if the Appellant had any such Defence, it was proper only at Law, where he has already solemnly tryed it upon an Issue of his own choosing, (and no very just one;) and it has not been known, that a Contract was ever set aside in a Court of Equity, except it was obtained by Fraud, or Circumvention, or wanted Consideration, none of which are pretended in this Case.

As to the Appellant's Pretences, that the Prizes of the Goods were Extravagant, we have fully answered it by our Proofs.

As the Debt recovered at Law and in Equity is the Appellant's proper Debt, so 'tis no manner of Injury to the Appellant to pay the Money, for he has been, and still is in Possession of his Regiment, and has, or ought to have saved out of the Off-reckonings to pay the Arrear; several other Colonels on the same new Establishment have done it, and it lies in his Power so to do. But the Respondents have no other Remedy but against the Appellant, and after being kept out of their Money above five Years, and forced to spend near 300 l. to get it, 'tis hoped your Lordships will not deprive them of the Money for ever, but that the Decree shall be Affirmed, and the Appellant pay Costs here and in the Court of Chancery.

Wm. Atwood

James Roddington and John Cholmley, Merchants, Appellants
John Tidcombe, Esq. Respondents

The Respondents C A S E

M R. James Roddington and John Cholmley, Merchants, Appellants, against John Tidcombe, Esq. Respondent. The Appellants bring against the Respondent a bill of exchange drawn on the Respondent by the Appellants, dated the 1st day of January 1701, for the sum of one hundred pounds, payable to the order of the Appellants, and which bill of exchange the Respondent has refused to pay. The Appellants pray that the Respondent may be compelled to pay the said bill of exchange, and that the costs of the suit may be awarded against the Respondent.

The Respondent denies the truth of the facts alleged by the Appellants, and prays that the bill of exchange may be declared null and void, and that the costs of the suit may be awarded against the Appellants. The Appellants insist that the Respondent is bound to pay the said bill of exchange, and that the costs of the suit should be awarded against the Respondent. The Respondent insists that the bill of exchange is null and void, and that the costs of the suit should be awarded against the Appellants. The Appellants insist that the Respondent is bound to pay the said bill of exchange, and that the costs of the suit should be awarded against the Respondent. The Respondent insists that the bill of exchange is null and void, and that the costs of the suit should be awarded against the Appellants.

John Tidcombe, Esq.
APPELLANT.

James Roddington,
AND
John Cholmley, Merchants } **Respondents.**

THE
Respondents CASE.
To be Heard the 30th of
March, 1701.

Monday